(1)

Supreme Court, U.S.
FILED

APR 18 2003

OFFICE OF THE CLERK

NO.: 021533

IN THE
SUPREME COURT OF THE UNITED STATES

RODERICK D. NELSON,
PETITIONER

v.

SPENCER J. COLEMAN, M. D.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA
CASE NO. 1020084

PETITION FOR A WRIT OF CERTIORARI

PETER A. DUMBUYA
Counsel of Record
1403 BROAD STREET
P. O. BOX 3302
PHENIX CITY, ALABAMA 36867
(334) 480-9336

---

22 pp

QUESTIONS PRESENTED

Whether, absent individualized suspicion based upon evidence of prior drug use such as drug-related convictions or self-reported drug use, compulsory drug tests and urinalysis as performed by respondent violate the Fourth Amendment to the Constitution of the United States.

Whether, without petitioner's informed consent, respondent's use of a catheter to collect a urine sample for drug screening invades petitioner's reasonable expectations of privacy.

PARTIES TO THE PROCEEDING

Petitioner, Roderick D. Nelson, is a private citizen who is not affiliated with any corporation or publicly held company.

Respondent, Spencer J. Coleman, M.D., is a physician licensed to practice medicine in the State of Alabama, and was the defendant in the Circuit Court of Elmore County, Alabama, and appellee in the Supreme Court of Alabama.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities iv

Table of Appendices v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of The Case 3

Reasons for Granting the Writ 6

I. Compulsory Drug Tests and Urinalysis are searches or seizures under the Fourth Amendment to the Constitution of the United States. 6

II. The Collection of Urine Specimen for Drug Screening by Respondent Implicates Petitioner's fundamental Privacy Concerns. 10

Conclusion 12

TABLE OF CITED AUTHORITIES

Cases: Page

Canterbury v. Spence, 464 F.2d 772 (D.C.Cir. 1972)... 9, 10

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987)..... 6

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)..... 6, 11

Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989)..... 7, 11

Statutes:

Ala. Code § 25-5-335 (1975)..... 8, 10

DIR Code § 480-5-6-.03(1)..... 9

28 U.S.C. §1367(c)..... 4

28 U.S.C. §1257..... 1

United States Constitution:

Fourth Amendment..... 2, 6, 7, 8, 9, 10, 11

Fourteenth Amendment..... 2

TABLE OF APPENDICES

Page

Appendix A—Certificate of Judgment of the Supreme Court of Alabama, January 24, 2003 . . . . . 1a

Appendix B—Order on Defendant's Motion for Summary Judgment of the Circuit Court of Elmore County, Alabama, January 29, 2002 . . . . . 2a

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Circuit Court of Elmore County, Alabama (per Bush, J.B., C.J.) granting respondent's motion for summary judgment (App. 2a) is not otherwise published. The Certificate of Judgment of the Supreme Court of Alabama denying petitioner's Petition for a Writ of Certiorari was entered on January 24, 2003 (App. 1a).

STATEMENT OF JURISDICTION

The Supreme Court of Alabama entered its Certificate of Judgment on January 24, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment.

STATEMENT OF THE CASE

On July 11, 2000, petitioner, Roderick D. Nelson, brought suit against the Wetumpka Water Works and Sewer Board ("Wetumpka Water Works"), Bill Allen, superintendent of Wetumpka Water Works, and respondent, Dr. Spencer J. Coleman, in the United States District Court for the Middle District of Alabama. In the original and second amended complaints, petitioner alleged that the use of a catheter (a tube that is inserted into the male urinary tract to obtain a urine sample) by respondent's employees to collect a urine specimen from him, at the direction of Allen, constituted an illegal search in violation of the Fourth Amendment to the Constitution of the United States, and an unauthorized and compelled intrusion into his body.

In addition, Nelson alleged that respondent's employees, nurses Elaine Henderson and Tence M. Reynolds, had

committed a battery upon him, and that respondent ratified and/or authorized such battery.

On November 16, 2001, petitioner and Wetumpka Water Works and Allen filed a joint stipulation for dismissal upon signing a settlement agreement. On November 19, 2001, the United States District Court for the Middle District of Alabama entered an order dismissing all claims against Wetumpka Water Works and Allen with prejudice, and, pursuant to 28 U.S.C. §1367(c), dismissing all claims against respondent without prejudice.

On December 6, 2001, petitioner filed suit against respondent in the Circuit Court of Elmore County, Alabama. In the complaint, petitioner alleged that respondent's employees had committed a battery upon him, and that respondent ratified and/or authorized such a battery. Additionally, petitioner demanded compensatory and punitive damages from respondent

for intentional infliction of emotional distress, negligence, and for lack of informed consent.

On December 13, 2001, respondent filed an answer, raising thirty-nine defenses. At the same time, respondent filed a motion for summary judgment. On January 14, 2002, petitioner filed his opposition and cross-motion for summary judgment to respondent's motion for summary judgment.

On January 16, 2002, the trial judge heard oral arguments on respondent's motion for summary judgment. On January 29, 2002, the trial judge issued an order granting respondent's motion for summary judgment (App. 2a).

On August 2, 2002, the Alabama Court of Civil Appeals affirmed the trial court's decision without opinion. On August 16, 2002, petitioner filed his Application for Rehearing, and the Court of Civil Appeals denied his timely filed Application on September 27, 2002. Petitioner then filed his Petition for a Writ of Certiorari contemporaneously with a brief.

On January 24, 2003, the Supreme Court of Alabama issued a Certificate of Judgment without opinion denying petitioner's Petition for a Writ of Certiorari (App. 1a).

REASONS FOR GRANTING THE WRIT

I.

COMPULSORY DRUG TESTS AND URINALYSIS ARE SEARCHES OR SEIZURES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is well established that compulsory drug tests and urinalysis are searches or seizures under the Fourth Amendment to the Constitution of the United States. As the Court noted in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), absent individualized suspicion based upon evidence of prior drug use such as drug-related convictions or self-reported drug use, mandatory drug testing is unreasonable. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), this Court held that:

> Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment.

The Alabama Supreme Court, in its No Opinion Certificate of Judgment, failed to balance the public interest in Wetumpka Water Works' drug testing program against the privacy concerns implicated by the test.

In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989), this Court considered the issue of whether drug tests given by railroads that complied with regulations promulgated by the Federal Railroad Administration ("FRA") were attributable to the government or its agents, and whether such drug tests amounted to searches or seizures under the Fourth Amendment.

As this Court noted, the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain

arbitrary and invasive acts by officers of the Government or those acting at their direction," and that "the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." Id. at 614. Among the indices this Court considered were specific features of the regulations that pre-empted state laws, and the fact that a covered employee was not free to decline an employer's request to submit to drug tests.

This Court concluded that there were clear indices that the government encouraged, endorsed, and participated in the performance of drug tests railroads were mandated to perform under Subpart D of the regulations. In other words, the nexus between the regulations and the conduct of the railroads was sufficient to implicate the Fourth Amendment.

Alabama law mandates that "A specimen shall be collected with due regard to the privacy of the individual providing the specimen." Ala. Code 25-5-335(c)(1). Because

it implicates fundamental privacy concerns, the collection of any human specimen constitutes a search under the Fourth Amendment to the Constitution of the United States. DIR Code § 480-5-6-.03(1). Henderson's and Reynolds' duty to obtain petitioner's informed consent is founded on the right of patients in general to control what medical professionals do to their bodies. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972). In light of all the circumstances, there can be no doubt that respondent's employees catheterized petitioner by compulsion of a sovereign authority, the Wetumpka Water Works, and the lawfulness of respondent's actions is controlled by the Fourth Amendment.

The decision below cannot be reconciled with prior decisions of this Court on the subject of drug testing. What is needed in this case is an assessment of the reasonableness of the drug testing program implemented by respondent at the direction of Allen and the Wetumpka Water Works.

II

THE COLLECTION OF URINE SPECIMEN FOR DRUG SCREENING BY RESPONDENT IMPLICATES PETITIONER'S FUNDAMENTAL PRIVACY CONCERNS.

Alabama law clearly stipulates that the collection of urine specimen for drug screening must be done with due regard to the privacy of the individual providing the specimen. Ala. Code §25-5-335(c)(1). Whether a reasonable person in Nelson's position would have consented to catheterization under the particular circumstances of this action was a question of fact for the fact finder to determine.

As noted above, respondent's duty to obtain petitioner's informed consent before catheterization is grounded on the right of patients in general to control what medical professionals do to their bodies. *Canterbury v. Spence*, supra. The collection of human specimen implicates privacy concerns, and constitutes a

search under the Fourth Amendment to the Constitution of the United States.

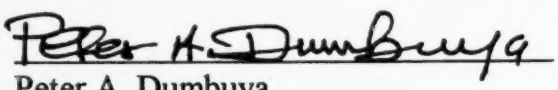
In *National Treasury Employees Union v. Von Raab*, supra, at 671, this Court noted that: "The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances."

In *Skinner v. Railway Labor Executives' Assn.*, supra at 616, this Court held that the collection of blood for drug screening "infringes an expectation of privacy that society is prepared to recognize as reasonable." Similarly, the Court noted that collecting and testing urine samples implicates privacy interests, and that such intrusions must be deemed searches under the Fourth Amendment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Peter A. Dumbuya
Counsel of Record
1403 Broad Street
P.O. Box 3302
Phenix City, AL 36867
(334) 480-9336

APPENDIX

IN THE SUPREME COURT OF ALABAMA

January 24, 2003

1020084
Ex parte Roderick D. Nelson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Roderick D. Nelson v. Spencer J. Coleman, M.D.) (Elmore Circuit Court: CV-01-606; Civil Appeals 2010580).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.
Writ Denied - No Opinion.
MOORE, C.J. - Houston, Lyons, Johnstone, and Woodall, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 24th day of January, 2003

S/ROBERT G. ESDALE, SR.
Clerk, Supreme Court of Alabama

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

RODERICK D. NELSON,

Plaintiff.

vs. **CASE NO. CV-01-606**

SPENCER J. COLEMAN, et al.,

Defendants.

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant, Dr. Spencer J. Coleman's, Motion for Summary Judgment and the Plaintiff's response thereto. Counsel for both parties appeared before the Court for oral argument on January 16, 2002.

After reviewing the pleadings, motion, briefs and documents attached, the Court is of the opinion that the Defendant's Motion is due to be Granted. To the extent that the Plaintiff's affidavit offered in opposition to the Defendant's

Motion for Summary Judgment conflicts with his deposition testimony it is stricken and not considered by the Court.

Although there does exist disputed issues of fact, these are not disputed issues of material fact. That being the case; when the Court views the facts in the most favorable light to the Plaintiff the Court still determines that the Defendant is entitled to a judgement as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment is GRANTED and judgement is therefore rendered in favor of the Defendant, Dr. Spencer J. Coleman.

DONE and ORDERED this 29th day of January, 2002.

S/JOHN B. BUSH
Circuit Judge